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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 510

JOHN W. TURNER, VIRGIL T. SEABERRY AND CARL P. SPRINGER, CO-PARTNERS ENGAGED IN BUSINESS UNDER THE FICTITIOUS NAME AND STYLE OF TURNER, SEABERRY & SPRINGER,

Plaintiffs and Appellees,

vs.

JAMES DONOVAN,

Defendant and Appellant.

JURISDICTIONAL STATEMENT ON APPEAL.

Dist. Court of Appeal. Filed Aug. 24, 1942. J. E. Brown, Clerk. J. W. Shenk, III, Deputy Clerk.

Comes now James Donovan, defendant and appellant, and files his jurisdictional statement on appeal as follows:

I.

The Provisions of the Code of Civil Procedure of the State of California Involved in This Action.

The Sections of the Code involved herein are as follows:

Sections 335 and 336 of the Code of Civil Procedure of the State of California.

II.

A Statement of the Federal Questions Sought to be Reviewed and Raised, Methods in Which They Were Raised and the Way They Were Passed Upon by the Court.

(a) Defendant and appellant interposed by proper pleadings the defense of the statute of limitations. (See pages 5 and 18 of Clerk's Transcript.)

(b) The statute of limitations was again raised by defendant and appellant during the trial of the case when the judgment sued upon was offered in evidence and objections made thereto, which objections were as follows:

1. As incompetent, and

2. On the further ground that it appears on the face of said judgment that a right of action to recover thereon is barred by the statute of limitation as defined in subdivision 1, of Section 336 of the Code of Civil Procedure of the State of California in that more than five years have elapsed since the said judgment was rendered and entered.

(c) The trial court overruled the demurrer, overruled the objections and held that the statute of limitations did not apply. (See page 15 of Clerk's Transcript.)

(d) The District Court of Appeals of the Second Appellate District, Division Three, sustained the judgment of the trial court and in doing so followed the case of *Feeney* v. *Hinckley*, 134 Cal. 467. (See opinion hereunto attached and marked Exhibit A which was filed May 25, 1942.)

III.

The Questions Involved Affecting the Substantial Rights of the Defendant and All Litigants.

(a) The legislature of the State of California in passing Sections 335 and 336 of the Code of Civil Procedure gave to every defendant a substantial right, the right to plead the statute of limitations and to have the law in relation to the statute of limitations properly and judicially construed without any legislative action upon the part of the Court.

(b) The time in which the plaintiffs had in this action to bring suit to recover on the judgment was five years as defined by Sections 335 and 336 of the Code of Civil Procedure, supra.

(c) The judgment sued upon was rendered on October 13, 1931, and entered on October 15, 1931. Five years from that date would expire on the 15th day of October, 1936. The present action brought on that judgment was filed on December 30, 1939, which was three years, two months and fifteen days after the action had been barred by the statute of limitations as defined by Sections 335 and 336 of the Code of Civil Procedure and judgment was rendered against defendant James Donovan and entered on May 27, 1940, on which an appeal was taken to the District Court of Appeals of the Second Appellate District of the State of California, Division Three, being No. 12921.

(d) The District Court of Appeals decision here in question followed the decision rendered by Judge Henshaw in the case of ***Feeney* v. *Hinckley*,** 134 Cal. 467, and in doing so held that the statute of limitations had not run and therefore did not apply. Judge Henshaw in rendering the

decision in that case, in order to avoid the statute of limitations, used the following language:

> "It is apparent at once that the statute requires construction, *and that something must be read into it by way of interpretation.*" (Italics ours.)

(e) A decision which violates the constitutional rights of a party to an action should never be followed by any court. When the District Court of Appeals of the Second Appellate District, that rendered its decision in this case, followed the *Feeney* v. *Hinckley, supra,* it committed just as grave an error as Judge Henshaw and violated the provisions of the Constitution of the United States by depriving defendant and appellant herein of his substantial rights to-wit, to have the statute of limitations correctly applied and also in their failure to so correctly apply the statute of limitations again violated the constitutional rights of defendant and appellant in depriving him of his property without due process of law.

(f) When a court reads into a statute or provision of the code language which is not there, it violates the provision of Article III of the State Constitution and the provisions of the Constitution of the United States in that it is assuming legislative power and authority which is by the Constitution of the State and the United States prohibited, and a Federal question then arises immediately.

(g) The decision of the District Court of Appeals herein sought to be appealed from and reviewed by this Court followed in the footsteps of Judge Henshaw and violated the provisions of the State Constitution and the Constitution of the United States in depriving defendant and appellant of his substantial right to have the statute of limitations applied and considered as a complete defense to the action and if allowed and permitted to stand will deprive the de-

fendant of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

(h) If the legislature created a difficulty regarding the statute of limitations it and it alone has the power to provide a remedy and the courts cannot assume or insert on that account something that the legislature may have failed to admit or to have intended to include. Chief Justice Marshall of this Court in 1817 in the case of *McIver, Lessees, et al.* v. *Ragan, et al.*, reported in 2 Wheaton, page 30, in construing a similar situation to the one included herein used the following language:

> "If this difficulty be produced by the legislative power, the same power might provide a remedy; *but courts cannot on that account, insert in the statute of limitations an exception which the statute does not contain.*" (Italics ours.)

Sections 335 and 336 of the Code of Civil Procedure of the State of California read as follows:

> "335. Periods of limitation prescribed. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:
>
> 336. Within five years. Within five years:
>
> 1. An action upon a judgment or decree of any court of the United States or of any state within the United States.
>
> 2. An action for mesne profits of real property."

(i) Sections 335 and 336 of the Code of Civil Procedure, supra, need to have nothing read into them in order to enable a court to correctly construe and apply the statute of limitations nor is it necessary to insert therein a meaning not intended by the legislature, nor was it or is it neces-

sary for the Court in violation of the Constitution of the State and the Constitution of the United States to exercise the functions of the legislature in order to give full force and effect to the statute of limitations above set forth.

(j) When a decision of any appellate court has been rendered that violates the Constitution of the State and the Constitution of the United States, it should not be followed thereafter. To follow such a decision does not correct the error first committed, and in doing so a federal question of substance was thereupon decided by the District Court of Appeals which has not theretofore been determined by this Court.

Assignment of Errors.

1. The trial court erred in admitting in evidence the judgment sued upon over the objections of the defendant and appellant. (See page 4 of Petition herein.)

2. The District Court of Appeal erred in holding and deciding that Section 336 of the Code of Civil Procedure of the State of California did not apply and that the statute had not run because the appeal taken from said judgment tolled the statute.

3. Sections 335 and 336 of the Code of Civil Procedure of the State of California are short, concise, definite and certain as they state in language that cannot be misunderstood or misconstrued that an action on a judgment cannot be maintained after the expiration of five years. A judgment of a court becomes a judgment the moment it is signed by the court and entered. There are no provisions in Section 335 or 336 of the Code of Civil Procedure of the State of California which justify any court in holding that the statute of limitations does not begin to run upon the rendi-

tion and entry of the judgment if an appeal is taken as there are no provisions in either Section that taking an appeal tolls the statute.

4. To hold that the statute of limitations is tolled by the taking of an appeal constitutes legislation upon the part of the court which it has no jurisdiction, authority or power to do.

5. To read into the Sections, as Judge Henshaw did, something which is not there, is exceeding the jurisdiction and power of the court and assumes legislative functions which not only are not granted by the Constitution but prohibited.

6. It deprives the defendant and appellant of his right of defense and his right to rely upon the statute of limitations.

7. It takes from him his property without due process of law in violation of the Constitution and Amendments of the Constitution of the United States.

Wherefore, defendant and appellant herein respectfully submits that he has shown the manner in which the federal questions are sought to be reviewed by this Court, were raised, the method of raising them, and that the questions affect the substantial rights of the defendant and appellant and all litigants. The decision of the District Court of Appeal of the Second Appellate District, Division Three, has involved the Constitution of the United States and the substantial rights of defendant and appellant.

Respectfully,

L. E. Dadmun,
Attorney for Defendant and Appellant.

APPENDIX "A".

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Three.

Jno. W. Turner, Virgil T. Seaberry and Carl P. Springer, co-partners engaged in business under the fictitious name and style of Turner, Seaberry & Springer, plaintiffs and respondents, vs. James Donovan, defendant and appellant. Civil No. 12921.

Filed May 25, 1942.

Appeal from the Superior Court of Los Angeles County, Chas. D. Ballard, Judge. Affirmed.

For appellant: James Donovan.

For respondents: Vernon Bettin.

In a prior action between these parties a money judgment in favor of plaintiffs was entered in October, 1931. Defendant appealed. Execution was not stayed, and upon levy of execution while the appeal was pending the judgment was satisfied partially. The judgment was affirmed, and the remittitur was filed on March 15, 1935.

The complaint in the present action, based upon the prior judgment, was filed in December, 1939. The answer denied only the allegation that the judgment became final on March 15, 1935 (when the remittitur was filed) and alleged that it became final for all purposes of this action when the prior judgment was entered in October, 1931.

As affirmative defenses the answer alleged: (1) That the judgment was enforceable under section 681 of the Code of Civil Procedure at any time within five years after entry thereof; that if, by reason of the appeal, the time until March 15, 1935, must be excluded from the five years within which execution may issue, then the judgment was still enforceable and this action may not be maintained; (2) That more than five years have elapsed from the date of entry of the judgment, and plaintiffs have an enforceable judgment under section 685 of the Code of Civil Procedure, and this action may not be maintained since it is a suit upon the same cause of action; and (3) that the time within

which an action might be commenced under section 336 of the Code of Civil Procedure expired in October, 1936 (five years after entry of judgment) and any right of action is barred by the statute of limitations under said section 336.

The court found that the action was not barred by the statute of limitations and rendered judgment for plaintiffs. Defendant appeals upon the judgment roll.

The principal question presented upon this appeal is whether the action is barred by the provisions of section 336, subdivision 1, of the Code of Civil Procedure. This section must be considered in connection with section 335 of that code, which is: "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:" Then follows section 336, which is in part: "Within five years: 1. An action upon a judgment * * * of any state within the United States." The inquiry arises as to when the period of five years commenced.

Appellant contends that it commenced at the time of the entry of the judgment in October, 1931; that a right of action, if any, based upon the judgment expired in October, 1936, and therefore was barred by the statute of limitations.

Respondents contend that such an action can be based only upon a judgment finally determining the controverted matters; that said period therefor commenced at the time the judgment became final, when the remittitur was filed in March, 1935, and the five years' statute of limitations had not expired when the complaint herein was filed in December, 1939.

Before an action based upon the former judgment could be commenced properly, it was necessary that the cause of action should have accrued. The cause of action did not accrue until the issues between the parties had been determined finally.

Section 312 of the Code of Civil Procedure provides: "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, * * *" Section 1049 of of the same code states: "An action is deemed to be pend-

ing from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

In Feeney *v.* Hinckley (1901), 134 Cal. 467, the action upon a judgment was commenced more than five years and less than six years after the entry of the judgment. No appeal was taken from the prior judgment, but the time within which an appeal could be taken was one year. On demurrer it was claimed that the action was barred by said section 336. The court said (p. 467): "If the five years commenced to run from the date of entry, the demurrer was properly sustained. If, however, it commenced to run only when the judgment became a finality, when the rights of the parties were fixed by it, when it was admissible in evidence for or against either of them—when, in short, a cause of action upon it had accrued—then, clearly, in case an appeal from the judgment be taken, the five years cannot be said to have commenced to run until final determination following such appeal, or in the event that no appeal be taken, then only when the time within which such an appeal might be taken has fully elapsed."

In that case it was stated further (p. 470): "It is the established rule and doctrine, then, that action will lie only upon a final judgment, and that in the generality of cases only such a judgment is admissible in evidence. If the five-years' statute of limitations is to commence to run from the date of the entry of judgment the anomalous condition is presented of a *right* of action which may be barred before the *cause* of action has accrued."

It was held that the action was not barred, the court stating further (p. 470): "* * * the statute begins to run only when the right of action has accrued, and this, as has been said and shown, is after final determination on appeal, in the event that an appeal has been taken, or after passage of the time in which an appeal might be taken, in the event that none has been."

The case of Feeney *v.* Hinckley, *supra,* decided in 1901, has been quoted with approval at various times, including a comparatively recent date as hereinafter shown.

In Willard *v.* Dobbins (1923), 191 Cal. 287, 294, it is said: "A cause of action upon a judgment does not accrue until

the judgment becomes final (Feeney *v.* Hinckley, * * *)''

In Stulz *v.* Bacon (1939), 35 Cal. App. (2d) 648, 649, it is said: ''However, it is settled law that the statute of limitations begins to run only after the date the judgment becomes final. (Feeney *v.* Hinckley, * * *)''

The case of Jones *v.* Summers (1930), 105 Cal. App. 51, 53, states: ''It has repeatedly been held that a cause of action upon a judgment does not accrue until the judgment becomes final, and that the statute of limitations does not commence running in such cases until the expiration of the time for appeal.''

It was stated in Trenouth *v.* Farrington (1880), 54 Cal. 273, and other early California cases, that the statute begins to run from the entry of the judgment. The issue presented in those cases, however, was whether the statute began to run from the date of rendition or from the date of entry of the judgment. The actions were within the five year period if the time began to run from the date of entry, but not within it if the time began from the date of rendition. It therefore appears that such statement is that the statute runs from the entry, was limited in its application to an issue quite different from that involved in Feeney *v.* Hinckley, *supra,* and in the present case.

In support of his contention, appellant relies in part upon cases of other states, including Utah, Montana, Washington, Nevada, Alabama, North Carolina, and Kansas. It is conceded in Freeman on Judgments, Fifth Edition, Vol. 2, section 1071, that the rule in most jurisdictions is that the statute of limitations begins to run from the date of entry of the judgment, but it is concluded therein that the California rule set forth in Feeney *v.* Hinckley, *supra,* is the theoretically correct and preferable rule. It is there stated (p. 2229): ''It would seem upon principle that a judgment should not be available as a cause of action until it has become a final and conclusive adjudication and merger of the claim or cause of action sued upon''; and (p. 2230): ''* * * the same reasons which have induced some courts to hold that the pendency of an appeal without supersedeas or stay or the mere unexpired right of appeal prevents a judgment from becoming an estoppel or bar, should equally prevent a judgment from becoming actionable under the

same circumstances, since the evil consequences would be the same in both cases. It cannot be said, however, that the position here taken is established by the authorities, since they have rarely considered the matter from exactly this point of view." It is there stated further (p. 2230), referring to Feeney *v.* Hinckley and the California cases; "* * * The right to or pendency of an appeal defeats the operation of the judgment as an estoppel and prevents an action upon it."

The judgment became final for the purposes herein involved when the remittitur was filed in March, 1935, and therefore this action was not barred by the statute of limitations.

Appellant's alleged defenses that this action may not be maintained for the reason that respondents had a judgment which was enforceable by execution under section 681 or section 685 of the Code of Civil Procedure, cannot be sustained. The question here is not whether respondents were entitled to an execution under one of these sections, or whether they were entitled to revive the judgment under section 685. The fact that one may be entitled to enforce an existing judgment by execution does not prohibit him from maintaining an action to obtain a new judgment for the balance due upon the former judgment. The "* * * enforcement of a judgment by execution and by action cannot properly be placed upon the same basis since they are different both in theory and results." (Freeman on Judgments, supra, sec. 1071, p. 2231.)"

The judgment is affirmed.

Wood (Parker), *J.*

We concur:

Schauer, *P. J.*

Shinn, *J.*